No. 22,337

IN THE

United States Court of Appeals For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BRICKLAYERS & MASONS INTERNATIONAL UNION,
LOCAL No. 3, and
FRANK S. LLEWELLYN, Secretary,
Respondents.

ON PETITION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENTS

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ARGUMENT

I. This Case Involves a Single Issue of Law; Hence the Conclusion of the NLRB Is Not Binding Upon This Court

The Petitioner's (referred to as "the Board") brief correctly states that an impasse in bargaining occurred over the inclusion of Article VI, Section III of the Respondent's (referred to as "the Union") contract pro-

posal. That section merely provided an agreed-upon remedy in cases of violations of the subcontracting limitation set forth in Article VI, Section 1. While the Board concedes, at least implicitly, that a clause limiting or prohibiting subcontracting constitutes a mandatory subject of bargaining, the Board argues that an employer is not required to bargain over the matter of remedy in cases of violation of the agreement. Stated differently, the Board argues that "remedy" is permissive rather than a mandatory subject of bargaining.

There are no factual issues presented in this case. We are here concerned with a pure issue of law. It is well settled that "an administrative determination of questions of law is not binding upon a reviewing court." 2 Am. Jur. 2d, "Administrative Law," Sec. 676. Here, as in *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 321, 326 (1951), the court is faced with "an issue of law . . . which goes to the heart of the validity of the proceedings on which the order is based," and such issues are "open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal." A Board order, like a building, must have a solid foundation, and the courts will not enforce orders of the Board which "rest on erroneous legal foundations." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). As will be demonstrated, the Board has in this case entered "in the substantive aspects of the bargaining process to an extent Congress has not countenanced." *NLRB v. Insurance Agents' International*, 361 U.S. 477, 498 (1960).

II. Inherent in the Acknowledged Substantive Right to Negotiate a Limitation Upon Subcontracting Is the Right to Negotiate With Respect to the Remedy in Instances of Violation of the Clause Limiting Subcontracting

At the outset it must be recognized that the everyday facts of industrial life are part and parcel of the legal concepts clustered around the duty of bargaining. In another, but related context, it has been observed that those who would restrict labor's right to effectively regulate subcontracting must of necessity shut their "eyes to the everyday elements of industrial strife." *Milkwagon Drivers Union v. Lake Valley Farm Products*, 311 U.S. 91, 94-96. Those who drafted the National Labor Relations Act did not suffer from the industrial myopia evidenced by the Board's order now before this court. The "term 'bargain collectively' as used in the Act 'has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States.' *Order of R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346 (1944)." *NLRB v. American Nat. Ins. Co.*, 343 U.S. 395, 408 (1952).

Turning then to a brief consideration of the facts of industrial life, we find increasing reliance by employers and arbitrators upon contract clauses reserving to the employer his "management rights." *NLRB v. American National Ins. Co.*, 343 U.S. 395, 409 (1952); *The Babcock & Wilcox Co.*, 45 LA 897[1]; *Capital Mfg. Co.*, 45 LA 1003. Similarly, time limitations for the filing of grievances are frequently negotiated and not infrequently enforced. *E.g., Northrop Northronics*, 43 LA 1114; *Krick-Tyndal*

1. "LA" refers to Labor Arbitration Service of the Bureau of National Affairs.

Company, 45 LA 257. Moreover, the facts of industrial life and the reported cases make it abundantly clear that employers and unions frequently specify in the labor agreement both the jurisdiction of the arbitrator and the type of relief which may be granted under the labor agreement. *Olin Mathieson Corp.*, 43 LA 623; *CWA v. New York Telephone Co.*, 42 LA 64; *In re Local* 1205, *Teamsters,* 42 LA 672.

The range of mandatory bargaining is indeed broad. We put to one side the obvious but interesting cases holding that the price of cafeteria meals, the rent for company housing and purchase of company stock constitute mandatory subjects of bargaining. Such cases—the Board would say—relate to employee benefits not union benefits and hence inapposite. But what then is to be said about the holding of this court that the subject of union security (i.e., a union shop clause) falls within the ambit of mandatory bargaining. *NLRB v. Jergens Co.,* 175 F.2d 130 (9th Cir. 1949). By the same token, what is to be said of the cases holding that the expiration date of the contract [*U. S. Pipe & Foundry Co. v. NLRB,* 298 F.2d 873 (5th Cir. 1962)], a no strike clause [*NLRB v. American Ins. Co.,* 343 U.S. 395, 408 (n. 22) (1952)] or matters involving the true interpretation of the contract [*NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 342 (1939)] constitute mandatory subjects of bargaining? Reflection upon the problem at hand requires the conclusion that the Board in this case has failed to heed the admonition that the "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements." *NLRB v. American Nat. Ins. Co.*, 343 U.S. 395, 408-409 (1952).

The decisions which have just been reviewed provide the frame of reference within which this case should be adjudicated. We are concerned with the negotiation of a subcontracting clause. All will concede that a union has a right under federal law to negotiate a clause prohibiting or limiting subcontracting. The Act, itself, makes this clear. 29 U.S.C., Sec. 158(e). See also: *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964), and *NLRB v. Retail Clerks Local* 648, 243 F.2d 777 (9th Cir. 1956). The right to negotiate over a given subject inherently includes the right to negotiate over the remedy in instances of violation. It is for this very reason that contracts commonly define or restrict the authority of arbitrators. Once it is conceded—and it must be conceded—that "the right is created," then it must be concluded that "the remedy exists." *Texas & N.O.R. Co. v. Brotherhood Ry. & S.S. Clerks*, 281 U.S. 548, 569-570 (1930).

One need not repair to the archives to obtain the citation to *Hadley v. Baxendale* in order to conclude that the breach of a subcontracting clause necessarily entails the loss of union dues and fees. Such damages are inherent in a breach of a subcontracting clause. Consider in this context the unanimous ruling of the Third Circuit sitting *en banc* that a union is entitled to recover lost dues incurred during the term of a contract where the employer breached the runaway shop clause of the contract. *Shoe Workers Local* 127 *v. Brooks Shoe Mfg. Co.*, 298 F.2d 277 (3rd Cir. 1962). Closer to home, but in the same vein, is the holding of the Tenth Circuit that a union was entitled to lost dues revenue where a mining company entered into a putative, independent contractor arrangement with its union employees. *New Park Mining Co. v. Steel-*

workers Local 4264, 288 F.2d 225 (10th Cir. 1961).

Lest it be thought that the cases run only one way, it should be noted that a union which fines a member-supervisor in violation of the labor agreement will be required to disgorge its illegal gains. *Columbia Typographical Union No.* 101 *v. Evening Star Newspaper Co.*, 233 F.2d 697 (D.C. Cir. 1956). And a union which violates its obligation to provide workmen under the hiring hall clause of the contract can be held liable for the employer's consequential loss of business. *Plumbers & Steamfitters Local* 598 *v. Dillon,* 255 F.2d 820 (9th Cir. 1958).

This case involves the question of whether a union can negotiate a remedy reasonably and proximately related to the breach of a substantive provision which all concede to be a mandatory subject of bargaining. We are not here concerned with a performance bond; and, accordingly, the cases relied upon by the Board are wholly inapposite. If an employer violates the wage clause of a contract, the obvious and appropriate remedy is to require that employer to pay the difference between the contract scale and the amount in fact paid. In other words, the right to receive a negotiated scale necessarily implies a remedy whereby the employee is made whole. The right to receive a negotiated scale does not, inherently, assume a trust *res* or surety bond against which the injury can be redressed. A violation of a subcontracting clause, of necessity, results in a loss of union dues to the union. The Union, in this case, has asked only that the employer recognize the inevitable and proximately related consequence of a violation of the subcontracting clause.

All of us know that a union cannot enforce a sub

contracting clause by economic action. All of us know that such clauses may be enforced by invoking grievance and arbitration procedures or by proceeding in the federal courts. *Sheet Metal Workers v. Hardy Corp.*, 332 F.2d 682 (5th Cir. 1964). Procedural clauses reasonably related to the interpretation and application of a contract clause which addresses itself to a mandatory subject of bargaining have a "vitally important connection"[2] with the substance clause. Hence, such procedural clauses must be viewed as part and parcel of the substantive clause to which they relate. The Union had a right to negotiate a subcontracting clause. Such right necessarily contemplates a meaningful method of redress in instances of violation. Right and remedy cannot be separated.

2. *U.S. Pipe & Foundry Co. v. NLRB*, 298 F.2d 873 (5th Cir. 1962)—expiration date held to be a mandatory subject of bargaining.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board's petition for enforcement should be denied.

DATED this 23rd day of April, 1968.

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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